

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -X
PRESTON CHARLES and CARLOS : 16-CV-6868 (KAM)
E. PABON, on behalf of :
themselves and on behalf of :
all similarly-situated :
individuals, :
Plaintiffs, :
-against- : United States Courthouse
OPINION ACCESS CORP., and :
JIMMY R. HOFFMAN, in his :
professional and personal :
capacities, :
Monday, March 11, 2019
Defendants. : 3:30 p.m.
- - - - -X

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONIC HEARING
BEFORE THE HONORABLE KIYO A. MATSUMOTO
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiffs: WIGDOR, LLP
85 Fifth Avenue
Fifth Floor
New York, New York 10003
BY: TANVIR H. RAHMAN, ESQ.
JEANNE-MARIE CHRISTENSEN, ESQ.

For the Defendant: DUANE MORRIS, LLP
1540 Broadway
New York, New York 10036-4089
BY: EVE I. KLEIN, ESQ.

Court Reporter: DAVID R. ROY, RPR
225 Cadman Plaza East
Brooklyn, New York 11201
drroyofcr@gmail.com

Proceedings recorded by Stenographic machine shorthand,
transcript produced by Computer-Assisted Transcription.

Proceedings

2

1 (In open court.)

2 (Parties appearing telephonically.)

3 THE COURT: Hello. Good afternoon. Can the
4 parties hear me.

5 MR. RAHMAN: Yes.

6 THE COURT: All right. Good afternoon. I am --

7 MS. KLEIN: Hi, Eve Klein here on behalf of the
8 defendants.

9 THE COURT: Just one moment, please.

10 This is Judge Matsumoto. I also have present --

11 MS. KLEIN: I can't hear.

12 THE COURT: I have present -- this is
13 Judge Matsumoto, and in addition, Judge Orenstein is here
14 with me. The case is Charles, et al. versus Opinion Access
15 Corporation and Jimmy Hoffman. The Case Number is
16 16-CV-6868.

17 Who do we have for the plaintiff, please.

18 MR. RAHMAN: Good afternoon, Your Honor. For the
19 plaintiffs this is Tanvir Rahman. I'm here with my
20 colleague Jeanne Christensen of Wigdor, LLP.

21 MS. KLEIN: And for the Defendants Opinion Access
22 Corp. and Jimmy Hoffman, Eve Klein of Duane Morris.

23 THE COURT: I'm sorry. You are a little bit
24 blurry. What is your name, ma'am.

25 MS. KLEIN: It's Eve Klein --

Proceedings

3

1 THE COURT: All right.

2 MS. KLEIN: -- of Duane Morris.

3 THE COURT: Thank you.

4 MS. KLEIN: It's very hard to hear.

5 THE COURT: Well, we are sorry. We are doing our
6 best with the equipment that we have.

7 MS. KLEIN: Okay.

8 THE COURT: We scheduled this conference because
9 we are aware that there are two pending motions, one for
10 final approval of the settlement and release, and another
11 motion in support of the plaintiffs' motion for attorneys'
12 fees and expenses. And as you know, I have referred these
13 motions to Judge Orenstein for a report and recommendation.

14 I was looking at the papers in any event because I
15 figured that there is a possibility that -- well, I would
16 have to look at them anyway in order to adopt or modify any
17 R & R. And I had growing discomfort about both motions,
18 frankly. I appreciate the parties' efforts in getting a
19 settlement in this case, but some of the terms in the
20 settlement agreement were troubling to me, particularly the
21 reversion aspect of it. And in addition, I was
22 uncomfortable with the attorneys' fees request for
23 33 percent or close to a half a million dollars of the total
24 settlement amount. And so I felt that rather than await the
25 R & R, I would speak to Judge Orenstein and see where he

Proceedings

4

1 stood. I will let him certainly speak for himself. But I
2 was going to be uncomfortable granting the motion.

3 So let me have Judge Orenstein just speak further.

4 JUDGE ORENSTEIN: Yes. Good afternoon, everybody.

5 As I am sure you got a sense from the final
6 approval hearing, I also have some deep concerns about the
7 proposal and it was my intention to recommend that the
8 motions be denied, primarily because of the reversion of
9 settlement funds to the defendants that -- the unclaimed
10 settlement funds to the defendants without the reversion of
11 attorneys' fees, which I think in turn exacerbates the
12 problem of the very high claimed fee award. It ends up with
13 the claimed fees being over 50 percent of the amount that
14 the defendants pay out under the settlement. So I was
15 planning to recommend denial.

16 I think Judge Matsumoto and I both agreed that it
17 would be more efficient for everybody if we made those
18 concerns known to you now, rather than to have you expend
19 further resources on litigation, particularly in light of
20 the concerns expressed in recent letters about hurrying
21 things along and possibly sending out further notice, which
22 would deplete the funds that you're using for other reasons,
23 if possible.

24 So I will turn it back over to Judge Matsumoto.

25 THE COURT: So the most efficient way forward, we

Proceedings

5

1 would like to propose that the motions be withdrawn and the
2 parties engage in further negotiations with the assistance
3 of Judge Orenstein on these issues of concern. That would
4 be the best. Or if the parties did not want to do that, we
5 would issue a decision and, as I said, in all likelihood,
6 you know, I am strongly inclined to deny the applications of
7 the two motions. So we wanted to touch base and see how you
8 would like to proceed.

9 And would you please identify --

10 MS. CHRISTIENSEN: Hi --

11 THE COURT: -- yourself -- ma'am, please identify
12 yourself before you speak. And that is true for all
13 attorneys who are planning to speak, please. Thank you.

14 MS. CHRISTIENSEN: Hi. Your Honor, this is Jeanne
15 Christensen of Wigdor, LLP.

16 Can you hear me okay?

17 THE COURT: Yes, we can hear you. Thank you.

18 MS. CHRISTIENSEN: Yes.

19 I was wondering the -- just to expedite this,
20 would it make a difference if instead of a reversion that
21 there was a not-for-profit of some sort that the unclaimed
22 funds went to?

23 THE COURT: Well, what is the reason that those
24 Plaintiffs who do assert a claim in this case cannot be
25 fully compensated before anything like that were to happen?

1 Because the defendants have already identified an
2 appropriate amount of settlement that it believes is
3 indicative of the risk it is willing to bear to settle now
4 rather than litigate, and we are still leaving the class
5 members with really a fraction of what they may be entitled
6 to? So before there is a reversion to anyone, it seems to
7 me that it might be appropriate to distribute *pro rata* the
8 amounts that are in the settlement fund to those Plaintiffs
9 who asserted a claim. Does that make sense, or is there a
10 reason why that cannot be done?

11 MS. KLEIN: Well -- Your Honor, this is Eve Klein
12 on behalf of the Defendants.

13 There is a second round of distribution of it, if
14 you will, of the settlement proceeds. Defendants must pay
15 out at least 30 percent so there is a limitation on the
16 reversion, but frankly, in settling the case, we took into
17 consideration, you know, what statistically was likely to be
18 collected, and we agreed to pay way more than we wanted to
19 with the understanding that there was going to be a
20 reversion. So, you know, from the Defendants' standpoint,
21 we could do it without a reversion, but we would want the
22 settlement numbers reduced.

23 THE COURT: So in other words, you would not be
24 willing to continue to offer the \$1.5 million if you do not
25 get all of the reversion?

Proceedings

7

1 MS. KLEIN: Well, yeah, I mean, it's important
2 that there be a reversion, and we're over that 30 percent
3 mark at fallback on the minimum for the distribution, and my
4 understanding is we're well above that. I haven't checked
5 the numbers recently, but Plaintiffs' Counsel may have that
6 information as to what it was going to cost Defendants. We
7 took into account the likelihood that some of that money
8 would come back and, therefore, increased our offer to a
9 point that was well beyond what my client wanted to pay.

10 So if that was going to be, you know, what the
11 Court was suggesting that there be no reversion and the
12 numbers stay the same, I wouldn't have authority on this
13 call to agree to that. I would have to ask my client, and
14 based on the premise of which we negotiated the settlement,
15 I think that would be problematic.

16 THE COURT: I mean, I think that as set forth in
17 the settlement papers or the motion, the Defendants'
18 exposure is far higher than the \$1.5 million if the
19 Plaintiffs were able to prevail. And although the
20 Plaintiffs' counsel laid out potential risks of litigation,
21 at least for a number of the plaintiffs I think that there
22 are numbers that can be determined, and it did not -- the
23 \$1.5 million, albeit more than the defendant wants to pay,
24 is indicative of any settlement. Every defendant who
25 settles a case is paying more than it wants to. But it's

Proceedings

8

1 taking into account the risk and benefits of going -- the
2 risks of going forward and the benefits of an early
3 resolution and ability to have some certainty in the
4 process. So I understand your point, but this is all the
5 more reason why it might be fruitful to have the -- even the
6 application can be denied or they can be withdrawn without
7 prejudice, and you can engage in further discussions with
8 your clients and then with each other.

9 MR. RAHMAN: Your Honor, this is Tanvir Rahman. A
10 few points I want to make, and I understand Your Honor's
11 position as well.

12 I was at the mediation with Ms. Klein. I have no
13 confidence that we'll be able to get a penny more than what
14 we've already agreed to negotiate, frankly. If we
15 renegotiated, I understand there's a reversion provision,
16 and obviously, as Ms. Klein mentioned, that was negotiated
17 as a term of the settlement. We made every effort we could
18 to ensure that as many class members sent back their forms
19 as possible. We sent claim forms by mail, by e-mail. We
20 re-mailed them if there was an old address. We sent them by
21 e-mail where applicable. We hired a claims administrator
22 who had a toll-free number. We tried whatever we could to
23 have as many people as possible, as many class members as
24 possible return their claim forms, and a substantial percent
25 of them did, over 20 -- close to 25 percent, ultimately

Proceedings

9

1 claiming about half of the potential funds allocated to the
2 class.

3 So again, to reiterate, you know, I -- I truly
4 believe that this settlement if not approved, it would be a
5 disservice to the class, and class members will ultimately
6 receive a lot less than they would -- I mean, those who
7 wanted to participate and have opted in and hoped to receive
8 a portion of the settlement will receive a lot less than
9 otherwise they would have receiving. And I believe those
10 points are all I have for Your Honor.

11 THE REPORTER: I am not getting him.

12 THE COURT: I'm sorry. We did not hear that last
13 comment.

14 THE REPORTER: Could you ask him to slow down,
15 Judge?

16 THE COURT: Could you slow down.

17 MR. RAHMAN: Yes. That's all I had at this moment
18 for Your Honor.

19 THE COURT: I mean, the point is in terms of
20 assessing the Defendants' position, we are not asking the
21 Defendant to put more money on the table. What I am
22 suggesting is the parties consider distributing a greater
23 amount to those class members who have claims in this case.
24 It is not going to exceed \$1.5 million, and there could be a
25 *pro rata* additional distribution from the funds that have

Proceedings

10

1 been placed in the settlement funds to make more whole those
2 parties.

3 Alternatively, and I think Counsel for Plaintiffs
4 has made this point, that any amounts not approved in the
5 fees would go to the authorized claimants on a *pro rata*
6 basis. But it just seemed that what is being proposed in
7 terms of the compensation to the authorized Plaintiffs is
8 really questionably adequate.

9 JUDGE ORENSTEIN: This is Judge Orenstein.

10 MS. KLEIN: Your Honor -- I'm sorry.

11 JUDGE ORENSTEIN: I'm sorry.

12 MS. KLEIN: Your Honor, this is Eve Klein for the
13 Defendants.

14 I want to be, you know, really transparent for the
15 Court. I mean, we came with a calculated determination, and
16 it was our understanding and in doing so determined there
17 would be some money that would be reverted to the
18 Defendants. So as a result of that, we increased our offer
19 in order to be able to do the deal. Of course, the
20 Plaintiffs were not willing to do the deal if there was a
21 different number, but if they were, we could have done it
22 without a reversion. But yes, we are on the hook for a
23 million 5, you know, if all the plaintiffs accepted the
24 settlement claim amounts, but from history, we knew that
25 would not be the case. So that was part of the negotiations

Proceedings

11

1 that we had from the defendants' standpoint and our client,
2 quite frankly, thinking it was going to happen, agreed to
3 pay up to 1.5.

4 JUDGE ORENSTEIN: This is Judge Orenstein. I
5 think that actually captures a lot of my concern about this
6 proposal. You presented to the class in their notice and as
7 Defendants are willing to pay a million and a half dollars
8 to buy peace and extinguish all the plaintiffs' claims, and
9 of that million and a half, a third -- up to a third will go
10 to the plaintiffs' counsel. But that's not what any of the
11 lawyers negotiating this deal and informing the class
12 actually think.

13 What they think is the defendants will pay less,
14 perhaps quite a bit less, to extinguish all of these claims
15 and the attorneys will get quite a bit more than a third.
16 And under those circumstances, I do not think that we are
17 getting a real honest reflection of how the class might
18 react if presented with a clearer understanding of what the
19 deal entails. I think you want to negotiate a deal that
20 says the defense will pay exactly X dollars, even if that is
21 less, and the plaintiffs' counsel will get no more than X
22 percent of that amount. Go ahead. In fact, I think that
23 gives us a better basis on which to assess a proposed
24 settlement.

25 MR. RAHMAN: Your Honor, we have not encountered

Proceedings

12

1 any confusion --

2 THE COURT: Who is speaking, please.

3 MR. RAHMAN: I'm sorry.

4 This is Tanvir Rahman.

5 THE COURT: Okay. Go ahead.

6 MR. RAHMAN: This is Tanvir Rahman for the
7 plaintiffs.

8 THE COURT: All right. Thank you.

9 MR. RAHMAN: My point being, I'm not aware of any
10 kind of confusion caused by the notice as Your Honor
11 suggests. But, Your Honor, the Court approved the notice
12 before it was disseminated. So I disagree that it is
13 confusing in any way, and, you know, we haven't been told by
14 anyone that it's confusing. I think, you know, the notice
15 is clear if people wanted to receive part of the settlement,
16 they had to send their claim forms back. You know, over a
17 thousand people did so. We have many people in the class,
18 the putative class, who worked at the company for a short
19 period of time. We provided the exact numbers in our letter
20 to the court that we submitted after the hearing. So, you
21 know, many of the long-term employees submitted a claim
22 form. That's why a large percentage of the funds that were
23 allocated to the class were ultimately claimed on behalf of
24 the class. So I don't know what could have been more. This
25 is what we have in terms of what was negotiated, and we

Proceedings

13

1 tried as best as we could to get these notices out to
2 people, the forms to get people to join, but you can't
3 control what people want to do. But, you know, we did what
4 we could. As to what Ms. Klein said, we're able to
5 negotiate up to a \$1.5 million settlement, obviously, you
6 know, accounting for the possibility of, you know, unclaimed
7 funds, or we could have otherwise gotten a much smaller
8 amount or had to settle for a much smaller amount but with
9 no reversion. For the people who are now -- who have joined
10 the case, their claim amounts will likely be a lot more
11 through this settlement than they would otherwise have.

12 THE COURT: Well, I think that we did approve the
13 preliminary notice in terms of the issue that you say that
14 now is a no reversion issue, that is not what we are saying.

15 And in terms of the fees, I think the plaintiff
16 may misunderstand that they seem to believe that they have
17 been approved for 33 percent when, in fact, that is not
18 true. The language clearly says up to 33 percent or the
19 \$500,000. But that is a ceiling, not an approved amount.

20 The concern, you know, I think articulated by
21 Judge Orenstein is that the class members given this number
22 that the fund is not really the fund, is what is concerning.
23 And at the time the notice went out, it could have been that
24 the fund would be inadequate to compensate any of the class
25 members, and the only concern I have is that what the class

Proceedings

14

1 members are expected to receive now that the notice has gone
2 out and you have heard from those folks is far less than --
3 you know, it is far less and there will be more than
4 sufficient funds in the settlement fund to compensate them
5 at a greater percent.

6 So look, Counsel, if you do not want to withdraw
7 this and renegotiate this, we respect it. We will issue our
8 decisions accordingly. Okay? I mean, I do not want to
9 force anyone's hand, but we thought it might be fruitful to
10 just give you a heads-up as to what we were thinking, what
11 our concerns were.

12 So let us know how you want to proceed and we will
13 proceed accordingly.

14 MS. KLEIN: Your Honor, this is Eve Klein. If I
15 could just clarify on the reversion issue. Are you saying
16 no reversion or too much of a reversion? Just so when we go
17 back, I'm clear on what the Court's position is on that.

18 THE COURT: I can speak for myself. I have not
19 said no reversion. I think I am just parroting what
20 Mr. Rahman said. He used the term "no reversion," and that
21 is not what --

22 MS. KLEIN: Okay.

23 THE COURT: -- I was thinking.

24 I was just saying that whatever the defendant may
25 have hoped for or currently believes will be coming back in

Proceedings

15

1 the form of reversion, should be re-evaluated because I
2 would like to see the qualified, authorized class members
3 compensated at a greater rate, those who have come in, so
4 that they are not receiving really just a percentage, a
5 small percentage of what they would otherwise be owed.

6 MS. KLEIN: Okay. Thank you, Your Honor.

7 THE COURT: How do you want to proceed, Counsel,
8 because I do not want to keep belaboring this.

9 MR. RAHMAN: Well, Your Honor, if we can speak to
10 our clients and that could take a number of days.

11 THE COURT: You want to go back to your clients?

12 MR. RAHMAN: Well, we have to, Your Honor. We
13 have to ask them what they want to do.

14 THE COURT: No, that is fine.

15 But the question I have is, you know, we -- well,
16 all we need to know is whether we need to issue a decision.

17 And also, Mr. Rahman, maybe you could explain why
18 one of the plaintiffs, Mr. Graciano is being proposed to get
19 an incentive award?

20 MR. RAHMAN: Yes. Mr. Graciano was -- he joined
21 as an opt-in very early on. He was one of the main
22 plaintiffs who participated in the litigation, and he was,
23 you know, involved in the case from the beginning, so...
24 And he provided us with important information. So that is
25 why, based on his efforts which helped lead to a settlement,

Proceedings

16

1 and that's why we believe he deserves recognition through an
2 incentive award.

3 THE COURT: All right. So do you want to just
4 maybe speak to your clients and each other and decide and
5 file a joint letter to Judge Orenstein and myself maybe a
6 day or two from now to let us know how you intend to
7 proceed? The proposals are, you know, we will issue a
8 decision on the motion if the motion is not withdrawn and
9 the parties choose not to renegotiate, not necessarily the
10 funds, but the reversionary aspects and the fees.

11 MS. KLEIN: If could you just repeat that last
12 part. I'm sorry. I couldn't hear.

13 THE COURT: The proposals are --

14 MS. KLEIN: Your Honor, you faded out.

15 THE COURT: The proposals --

16 MS. KLEIN: I'm having difficulty hearing. If you
17 could just repeat the last thing you said.

18 THE COURT: What I was saying is that if you do
19 not want to withdraw the motion, we would issue a decision,
20 or your joint letter could inform us that you would like to
21 renegotiate the reversionary clause of the settlement fund
22 amount and the fees.

23 MS. KLEIN: Okay.

24 THE COURT: Or issue -- I mean, I do not know if
25 it is -- I do not know whether the fee percentage was

Proceedings

17

1 something that the parties negotiated, but let me put it
2 this way: The 33.3 percent that the plaintiffs seek, in my
3 view, is excessive in light of the amount that is being
4 proposed for class members. So I think maybe a couple of
5 days for you to speak with your clients and with each other
6 and jointly advise us how you want to proceed, maybe would
7 be an appropriate way to proceed.

8 Does that make sense?

9 MS. KLEIN: Yes.

10 MR. RAHMAN: Yes, Your Honor.

11 THE COURT: Okay. So could we expect to hear from
12 you by close of business on Wednesday, March 13th, please.

13 MS. KLEIN: That's a little bit short on time for
14 me, Your Honor, based on I have to be on-site someplace
15 tomorrow. So I'm not going to be able to speak to my client
16 and speak to my adversaries so we ask that we could at least
17 have until the end of this week, on Friday.

18 THE COURT: All right. Well, Friday it will be,
19 then. Thank you. Friday close of business, please.

20 MS. KLEIN: Thank you.

21 MR. RAHMAN: And, Your Honor, is this hearing
22 being taken down by a court reporter?

23 THE COURT: Yes. We will put his name in the
24 minutes.

25 MR. RAHMAN: Okay.

Proceedings

18

1 MS. KLEIN: Your Honor, I would like to get a copy
2 of the transcript. That would be helpful.

3 THE COURT: All right. Well, you can speak with
4 him.

5 MS. KLEIN: Okay. What is the court reporter's
6 name today?

7 THE COURT: All right. The court reporter's name
8 is David Roy. He is just writing down his phone number for
9 me. If you would like to order the transcript, it is
10 (713) 619-2609.

11 MS. KLEIN: Okay. Thank you, Your Honor.

12 THE COURT: His name will be also in the minute
13 entry that we enter today. All right. Thank you, Counsel,
14 for being available on short notice.

15 JUDGE ORENSTEIN: Thank you.

16 (Matter concluded.)

17 (Telephone line disconnected.)

18 --oo0oo--

19

20

21

22

23 *I (we) certify that the foregoing is a correct transcript*
24 *from the record of proceedings in the above-entitled matter.*

25 /s/ David R. Roy
DAVID R. ROY

11th Day of March, 2019
Date

David R. Roy, RPK, CSK, CCR
Official Court Reporter